IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10140 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M. S. SHAH Sd/-
AND
HONOURABLE MR.JUSTICE K. A. PUJ Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ? YES
2	To be referred to the Reporter or not ? YES
3	Whether their Lordships wish to see the fair copy of the judgment ? NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO
5	Whether it is to be circulated to the civil judge ? NO

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MACAWBER BEEKAY LTD. - Petitioner
Versus
GUJARAT STATE ELECTRICITY CORPORATION LTD. & 1 - Respondents

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Appearance :
MR KS NANAVATI, SENIOR ADVOCATE FOR NANAVATI ASSOCIATES for Petitioner.
MR MD PANDYA for Respondent No. 1.
MR MIHIR JOSHI, SENIOR ADVOCATE WITH MR GAURAV S MATHUR for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 28/09/2007
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the Constitution of India, the petitioner challenges the decision of respondent No. 1 – Gujarat State Electricity Corporation Limited to award the contract in question to respondent No. 2.

2. The first respondent had invited tenders for Ash Handling Plant System with Accessories for 1 x 75 MW Kutch Lignite Thermal Power Station Extension Unit No.4 in August 2005 at an estimated cost of Rs.15 Crores. The petitioner was also one of the bidders. Since the bids quoted by the two eligible bidders including the petitioner were found to be on the higher side (Rs.21 Crores and more), the first respondent decided to re-invite the tenders with some modifications in the technical as well as financial aspects at an estimated cost of Rs.12 Crores. On the second occasion, three parties were found to be eligible and the bids quoted by them were as under :-

(1)	M/s. Energo Engineering Projects Limited (Respondent No.2)	Rs.12,98,45,266/-	L – 1
(2)	Indure Private Limited	Rs.16,05,91,000/-	L – 2
(3)	Macawber Beekay Limited (Petitioner)	Rs.16,14,19,400/-	L – 3

3. The Board of Directors of respondent No. 1 resolved and accorded approval to call the second respondent, the lowest bidder to conclude the final scope and prices by obtaining required confirmations and clarifications. On 03.02.2007, the matter was discussed by the Managing Director with the second respondent who submitted all required certification as required by the Central Electricity Authority and ultimately work order dated 26.03.2007 was placed by the first respondent in favour of the second respondent.

4. The petition came to be filed on 12.04.2007. In response to the notice, affidavits-in-reply have been filed on behalf of the first respondent and also on behalf of the second respondent.

5. When the matter reached hearing today, Mr. Mihir Joshi, learned Senior Counsel for the second respondent has submitted that after obtaining the work order on 26.03.2007, the respondent No.2 has acted promptly in order to meet the schedules of the project and huge financial commitments of almost Rs.7 Crores have been made including ordering and supplying components worth Rs.4 Crores approximately, investment of Rs. 2 Crores in self manufactured items and also finishing the design and engineering work, appointment of Contractors etc. for the successful completion of the project. It is submitted that the petitioner has approached this Court with undue delay of 2 months approximately after issuance of Letter Of Intent and 2 weeks approximately after the issuance of Work Order dated 26.03.2007 and that any interference as sought for will cause tremendous hardship and prejudice to the second respondent.

6. Mr. K. S. Nanavati, learned Senior Counsel for the petitioner has, however, submitted that the first respondent authority has awarded the contract in favour of the second respondent by deviating from the norms set out by the first respondent itself in the tender notice, both in respect of the technical parameters and the financial parameters and that the deviations from these parameters are so serious that non-interference by this Court would only mean gross violation of the Rule of Law. In view of the above, we have examined the challenges at some length.

7. Mr. Nanavati has submitted that the tender notice required the bidder to possess, inter alia, the following technical and financial qualifications :-

(i) Tenderer should have supplied erected, tested and commissioned order for equivalent capacity of specified plants on turn key basis on his own or in joint venture.

(ii) The words "equivalent capacity of specified plants" referred above shall mean the following :

(a) Pressure conveying dry ash collection system (as per specification clause No. 3.2.2) capacity shall be minimum 40 TPH Ash removal per stream.

(b) Wet ash slurry disposal system of minimum 450 M3/hr capacity.

(iii) The tenderer should have executed in all respect atleast one order as per (i) and (ii) mentioned above in the last 3 years and the same plant should be working satisfactorily for the last one year.

(iv) The tenderer should have annual turnover on his own of minimum Rs. 12 Crores for each of the last three financial years."

It is submitted that the second respondent did not have annual turnover on his own of minimum Rs. 12 Crores for each of the last three financial years and that even on their own showing the second respondent had such turnover only in one of the three years. Hence, the second respondent did not fulfill the financial eligibility criteria for financial terms.

Secondly, it is submitted that the tenderer was required to have supplied, erected, tested and commissioned order for equivalent capacity of specified plants which meant pressure conveying dry ash collection system and Wet Ash slurry disposal system of the specified capacities. In the instant case, the second respondent did not have the experience in pressure conveying dry ash collection system and the system that has been erected by the

second respondent is a hybrid of pressure conveying system and vaccum / suction conveying system instead of purely pressure conveying system, which is the requirement under the tender notice. Therefore also, the second respondent was not eligible in terms of the technical criteria.

Thirdly, it is submitted that such serious deviation from both the technical norms and financial norms was not permissible merely because the offer of the second respondent was the lowest. It is submitted that an opportunity ought to have been given to the petitioner to match the offer made by the second respondent in which case the first respondent would have been able to award the contract to a party who fulfilled all the technical as well as financial criteria with price matching the lowest price offered by an unqualified and ineligible bidder.

8. It is the case of the respondent Board that -

8.1 the tender work in question is a part of the project to bridge the gap between the demand and availability of electricity. The first respondent is in the process of extending the capacity of the Kutch Lignite Thermal Power Station for which purpose it has already placed orders for heavy machineries with Bharat Heavy Electricals Limited ('BHEL' for short). The main plant and equipments including turbine generator and steam generator along with auxiliaries are supplied by BHEL and the balance of plant packages are arranged separately by the first respondent by tenderizing process of packages. Thus, Ash handling plant package is one of the Balance of Plant packages which mainly removes and disposes of ash. Ash which is being generated at a rate of about 100 Tones/hour with worst lignite firing will have to be disposed off. In case, ash handling plant is not installed and made operative then huge amount of ash will be stacked in boiler area which will be a hindrance to operation of the generator unit and in that case, it

may not even be possible to run the unit. It is, therefore, submitted that there is urgency in commissioning the extension of the power generator capacity and the consequential urgency in providing for the ash handling plant as well.

8.2 When the first respondent had invited tenders in the year August 2005, only two bidders were found to be eligible and as against estimated cost of Rs.15 Crores for the ash handling plant, the lowest bid offered by the petitioner was about Rs.21.55 Crores and that of the second eligible bidder was about Rs.23.90 Crores. The first respondent Board, therefore, thought it fit not to award the contract and to re-invite tenders. While re-inviting tenders, in consultation with the Project Consultant, the Board revised the scope of the earlier tender which resulted into the reduction of estimated cost of the tender from Rs.15 Crores to Rs. 12 Crores expecting that this modification in technical scope would also result into saving of time for completion of the project.

8.3 Accordingly, the first respondent invited fresh tenders in December, 2006 and four bidders submitted their technical bids and price bids. The technical bids were received and opened on 20.12.2006 and the post technical bid discussion was held with the tenderers between 26th and 28th December, 2006 in order to get across the table confirmation in regard to the technical offers. In light of such clarifications and confirmations, all the bidders desired that they would like to submit price revision / fresh price bid. Accordingly, revised price bids were invited by 05.01.2007. The revised price bids are already quoted in paragraph 2 hereinabove. The explanation offered by the first respondent in the reply affidavit for relaxing the norms set out in the tender notice is considered herein below.

9. As regards the petitioner's challenge to the financial eligibility criteria of the second respondent, we find that though the annual turnover of the second respondent was more than Rs.12 Crores only in one out of three years, as required by the tender conditions, the Project Consultant – the Central Electricity Authority recommended that since the second respondent had submitted Bank Solvency Certificate of Rs.20 Crores from their Bankers Punjab National Bank as against the requirement under the tender conditions to the tune of only Rs. 2.4 Crores, the financial strength and capacity of the second respondent was adequate to qualify it for consideration.

10. As regards the technical criteria, we find that the technical aspect was got examined by the first respondent by actual verification on the site where the second respondent has set up and commissioned an ash handling system project for Jindal Power & Steel Limited. The Superintending Engineer (Renovation & Modernization) of Project & Planning Department was deputed to visit Jindal Power & Steel Limited for actual verification and for collecting the required details. The said Officer had discussed the matter with the Project Manager of the Jindal's project at New Delhi and with the Vice President of the Power plant at Raigarh. The Superintending Engineer had visited the plant site along with Deputy Manager of the power plant and had found that the ash handling system installed by the second respondent had been working without any major problem.

11. With all the above facts and relevant record including Central Electricity Authority's recommendation, the papers were put up for deliberation and discussion for the Board of Directors comprising of the following officials :-

Sr. No.	Name	Department
01.	Smt. Vijayalaxmi Joshi, IAS CHAIRPERSON.	Principal Secretary, Energy & Petrochemicals Deptt. Government of Gujarat.
02.	Shri Gurdeep Singh MANAGING DIRECTOR	
03.	Shri L. Chuaungo, IAS DIRECTOR.	Managing Director Gujarat Urja Vikas Nigam Limited.
04.	Shri I. P. Gautam, IAS DIRECTOR	Commissioner Ahmedabad Municipal Corporation
05.	Shri Munindra Bhatt DIRECTOR	Additional Secretary (Taxation), Government of Gujarat.
06.	Shri Benjamin S. Reuben DIRECTOR	Retd. Exe. Director – Ahmedabad Elect. Co. Ltd.
07.	Prof. N. Venkiteswaran DIRECTOR	Faculty – (Finance) Indian Institute of Management.
08.	Shri Praful H. Rana DIRECTOR	Director (Technical) Gujarat Urja Vikas Nigam Limited.
09.	Shri H. P. Desai DIRECTOR	Retd. Director (Procurement) – erstwhile G.E.B.
10.	Shri Jyoti Swarup Mathur DIRECTOR – (IDBI NOMINEE)	Retd. Dy. C.A. G. - Govt. of India – New Delhi.
11.	Shri Sanjay Kumar Tandon DIRECTOR (IFCI NOMINEE)	Dy. General Manager IFCI LTD.

12. The decision of the first respondent to relax the norms in respect of financial criteria and also in respect of the technical requirements was taken in consultation with the Project Consultant – Central Electricity Authority and after site verification of the ash handling plant set up by the second respondent for Jindal Power & Steel Limited. Hence, the work order issued in favour of the second respondent on 26.03.2007 cannot be said to be arbitrary or lacking in bona fides.

13. We may also note the relaxation made by the first respondent in favour of the petitioner. As per the tender conditions, the bidder was required to have erected and commissioned a specified plant atleast one plant in the last three years. However, the last plant set up by the petitioner was in January 2003 / June 2003. Hence, when the tenders were invited second time on 01.12.2006, during the period between 01.12.2003 and 01.12.2006, the petitioner had not put up any plant. The petitioner having obtained the benefit of such relaxation is estopped from challenging the relaxation by the first respondent of the some other norms in favour of the second respondent.

14. As regards the petitioner's contention that it should have been given an opportunity to reduce its rates, we do not find any merit in this contention. The first respondent had invited tenders as per the two bid system. After the technical bids were opened, the post technical bid discussion was held with the tenderers in order to get across the table confirmation in regard to the technical offers and in light of such clarifications and confirmations, all the bidders desired that they want to submit price revision/fresh price bids. Accordingly, the revised price bids were invited by 05.01.2007. The revised price bid offered by the petitioner was Rs.16.14 Crores as against the revised bid of the second respondent at Rs.12.98 Crores. In this fact situation, no fault can be found with the first respondent in not giving the petitioner still another opportunity to reduce its price.

Even otherwise, we are not inclined to entertain this grievance because the first respondent has rightly pointed out the urgency involved in the matter. Under the terms of the tender conditions, the contract work is required to be completed in all respects within 12 months reckoned from the date of issue of the letter of Intent. Since the Letter of Intent was issued in favour of the second respondent on 08.02.2007, the contract work will be

required to be completed by 08.02.2008. Almost 8 months have rolled by since the Letter of Intent was issued and investment of funds to the tune of almost Rs. 7 Crores has been made by the second respondent which has also invested considerable time and efforts in relation to a work which is part of the project of the first respondent for enhancing the capacity of the Thermal Power Plant, to supply additional generated power, we are of the view that no interference of this Court is called for in exercise of the extraordinary writ jurisdiction under Article 226 of the Constitution of India.

15. In Tata Cellular case, AIR 1996 SC 11, the Hon'ble Supreme Court has held that while exercising the power of judicial review in tender matters, the following parameters are required to be kept in mind :-

> "(1) The modern, trend points to judicial restraint in administrative action.
>
> (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
>
> (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested

> by the application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

After laying down the above parameters, the Apex Court further enunciated the following principle :-

> “In all these cases (of judicial review of administrative decisions in tender matters) the test to be adopted is that the Court should consider “whether something has gone wrong of a nature and degree which requires its intervention”.”

16. Mr. Nanavati for the petitioner has relied on three decisions in support of his contention that the decision of the respondent authorities in relaxing the norms in favour of the second respondent is illegal.

17. The decision in B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd., 2006 (11) SCC 548 does not advance the case of the petitioner because the said decision clearly recognises that whether an employer has power of relaxation of a condition in a tender must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India and that for the said purpose, the Court may consider the practice prevailing in the past. The Apex Court then went a step further and observed in the same paragraph 69 of the judgment :-

> “keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf.”

After recognizing such power with the authority, the Apex Court further observed as under :-

> "Once such a power is exercised, one of the questions which would arise for consideration by the superior Courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

In paragraph 66 of the same judgment also, the Apex Court has laid down several principles, some of which are as under :-

> "When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.
>
> Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint."

The Apex Court has also observed that while the law operating in the field is no longer res integra, the application of law, however, would depend upon the facts and circumstances of each case.

18. In the facts of this case, the answer to the question "whether exercise of such general power of relaxation in this case was fair, reasonable and bona fide" is not in the negative. In view of the fact that the Board of Directors of the first respondent comprising of several senior administrators with managerial and technical competence were satisfied that the technical credentials of the

second respondent in installation of Ash Handling Plant for Jindal Steel and Power Ltd. are sufficient for the requirements of the tender work in the present case for Ash Handling Plant Systems with Accessories for 75 MW Kutch Lignite Thermal Power Station Extension Unit No.4, this Court would not sit in appeal over such decision on a highly technical question. Similarly, the recommendation of the Central Electricity Authority that furnishing of the solvency certificate by the second respondent to the tune of Rs.20 crores is sufficient to offset the absence of annual turnover of Rs.12 crores and above in two out of the last three years can also not be said to be unreasonable, when the price at which, the second respondent offered to erect and install Ash Handling Plant System with accessories is less than Rs.13 crores as against the price of more than Rs.16 crores quoted by the petitioner and another eligible tenderer. The impugned decision certainly qualifies to be treated as a decision in public interest as the first respondent authority would be saving a substantial sum of more than Rs.3 crores without sacrificing the technical requirements as the second respondent has already erected and installed Ash Handling Plant System for Jindal Steel and Power Ltd. in Rajasthan and the said system is working without any major difficulty. Apart from the aforesaid aspect regarding savings, what has also weighed with us is the urgency with which the project is required to be completed. Without such Ash Handling Plant, the first respondent will not be able to expand the electricity generation capacity of its Kutch Lignite Thermal Power Station for which the Central Government has also been exhorting the first respondent to commission the Kutch Lignite Thermal Power Station Unit No.4 at the earliest.

19. The decision in W.B. State Electricity Board Vs. Patel Engineering Co. Ltd. (2001) 2 SCC 451 was a case where a consortium of bidders had made serious errors in tender documents. On the appellant Board pointing out those errors, the consortium which had submitted these tender papers sought to

correct the mistakes. Since the appellant Board did not oblige, the consortium of four respondents filed a writ petition where the learned Single Judge directed the appellant to consider the representation of the respondent consortium. The appellant rejected the representation. Not approving of the said decision, the learned Single Judge directed the appellant to reconsider the matter. Both the parties filed appeals and ultimately, a Division Bench allowed the writ petition, quashed the letter of the appellant by which it had informed the respondent consortium that the quite a few mistakes had been detected in the bid documents and the Division Bench further directed that the respondent consortium should be allowed to correct the mistakes in the bid documents and that their bid should then be considered along with the others.

It was in the context of the above facts that the Apex Court held that permitting the bidder to correct errors in the bid documents, which were not merely clerical or mechanical, and when such corrections were not permissible under the Rules governing the process of tender, such a direction was not within the scope of judicial review. The Court observed that Rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism which are contrary to Rule of Law and constitutional values.

20. In the facts of the present case, there was no question of the second respondent having been permitted by the first respondent to correct mistakes in their bids. The question in the instant case is whether relaxation by the first respondent in the eligibility criteria was fair, reasonable and in public interest as indicated in the decision of the Apex Court in B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. (Supra). On the facts of the present case, it is not possible to hold that the decision of the first respondent in relaxing the eligibility criteria was arbitrary or suffering from discrimination or favouritism and it is certainly not against public interest.

21. The decision in Air India Ltd. Vs. Cochin International Airport Ltd. (2000) 2 SCC 617 supports the case of the respondents rather than of the petitioner. After observing that the State and its instrumentalities are bound to adhere to the norms, standard and procedure laid down in the tender documents, the Apex Court observed that even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

22. As discussed earlier, in the facts of this case overwhelming public interest does not require any interference with the impugned decision of the first respondent. Hence, even assuming that the impugned decision of the first respondent was not strictly in keeping with the norms and standards stipulated in the tender conditions, nothing went wrong in the decision making process of the first respondent of such kind and degree that interference of this Court would be called for.

23. In view of the above discussion, we do not find any merit in the petition. The petition is, therefore, dismissed.

Notice is discharged.

Sd/-
[M. S. SHAH, J.]

Sd/-
[K. A. PUJ, J.]

Savariya/mrpandya